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NYLS Journal of International and Comparative Law

Volume 3
Issue 1 *Volume 3, Number 1, 1981*

Article 5

1981

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COMMENTS ON SPEECH BY JUDGE ODA

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Judge Oda is to be congratulated on his far-reaching analysis of the sharing of ocean resources. We are particularly struck by his views on the evolving concept of the "common heritage of mankind." In these few comments, we would like to expand slightly upon his observations about the application of this concept to the protection and preservation of the marine environment and in other areas.

A. *Protection and Preservation of the Marine Enrivonment*

Judge Oda observed[1] that some years ago he had predicted that the concept of the common heritage of mankind would also be introduced with respect to the prevention of marine pollution. We not only agree with Judge Oda on this point, but would go even further. As a result of growing ecological and industrial interdependencies, we believe that the marine environment is necessarily an area of common concern and an essential part of the common heritage.

As to the achievements of the Third United Nations Conference on the Law of the Sea in recognizing and dealing with common environmental exigencies, we are perhaps slightly more optimistic than Judge Oda. We think that UNCLOS has made marked progress, not only in the codification, but also in the progressive development of international law for the protection and preservation of the marine environment. In this regard, attention is directed to the provisions of the Draft Convention of the Law of the Sea[2] with regard both to environmental standard-setting and to enforcement of environmental norms and standards.[3]

First, as regards prescription or standard-setting, the Conference has, naturally, been especially concerned with the prevention, reduc-

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1. Oda, *Sharing of Ocean Resources — Unresolved Issues in the Law of the Sea*, 3 N.Y.J. INT'L & COMP. L. 1 (1981).
2. U.N. Doc. A/Conf.62/L.78 (1981).
3. *Id.* arts. 207-222.

tion and control of pollution from vessels. Recognizing the ineffectiveness of old notions of unfettered flag state discretion, states at UNCLOS have recognized enhanced roles for states whose sovereign self-interest coincides with common environmental interests. Thus, for example, coastal states may adopt anti-pollution laws and regulations for the territorial sea, provided that laws and regulations affecting ship design, construction, manning or equipment ("dcme" standards) of foreign ships are not more burdensome than international standards.[4] Dumping within the territorial sea and the economic zone or onto the continental shelf cannot be carried out without the express prior approval of the coastal state.[5] And there are additional provisions for "special areas" within economic zones, "ice-covered areas," and other problems relating to vessel source pollution.[6]

Particularly in the area of pollution from ships, therefore, we feel that UNCLOS has come a long way toward effecting a viable and workable regime for the protection and preservation of the marine environment. This does not mean, however, that the Draft Convention is necessarily either satisfactory or immutable in its environmental provisions. Some environmentalists, for example, take strong exception to the restrictions as to "dcme" standards in the territorial sea. But, overall and from the perspective of the "art of the possible," we feel that UNCLOS has made progress toward achieving an acceptable balance which will not unduly hamper international shipping, but which will nevertheless secure a greater measure of environmental protection and preservation.

Besides pollution from ships, it might be noted that UNCLOS has at least made a start toward dealing with other types of marine pollution problems. The Draft Convention, in its section on international rules and national legislation to prevent, reduce and control marine pollution, also contains articles on pollution from land-based sources,[7] from seabed activities,[8] from activities in the Area,[9] by dumping[10] and pollution which arrives from or through the atmosphere.[11] These articles are, admittedly, largely hortatory, and considerable work will be required for the future development of the law in these areas. Still, while recognizing the deficiencies and the incomplete nature of the work, we do feel UNCLOS is deserving of a greater measure of congratulations than Judge Oda is apparently willing to accord the

4. *Id.* art. 211.
5. *Id.* art. 210.
6. *Id.* arts. 211(6), 234.
7. *Id.* art. 207.
8. *Id.* art. 208.
9. *Id.* art. 209.
10. *Id.* art. 210.
11. *Id.* art. 212.

Conference.

Turning from prescription or standard-setting to application or enforcement of the law, again we feel that UNCLOS has made some notable achievements. Previously, enforcement of environmental rules and regulations beyond national jurisdiction was left almost exclusively to the flag state, which was often merely a flag of convenience and, in any event, may have had little incentive to enforce such rules and regulations. Recognizing the deficiencies in this regime, states at UNCLOS developed expanded roles for port and coastal states in this regard. From the environmental perspective, one of the notable achievements in recent years has been acceptance at UNCLOS of the concept of universal port state enforcement jurisdiction.[12]

Once more, there are defects and gaps. Many environmentalists think the provisions under which flag states may in certain cases preempt enforcement proceedings by other states[13] unduly undercut the effectiveness of the whole new regime, others have problems with the numerous and detailed "safeguards" in the text supposedly designed to ensure freedom of navigation.[14] Still, neither environmentalists nor shippers can have things entirely their own way, and UNCLOS is to be congratulated on achieving a compromise which neither likes but both find livable.

While not, it follows, wildly enthusiastic about the Draft Convention, we do think it comes a significant distance toward answering some of the questions about marine environmental protection posed by Judge Oda. Likewise, in the area of living resources and of deep seabed mineral resources we are more optimistic than he is. A few brief remarks will follow on these topics.

B. *Living Resources*

Living resources posed, as Judge Oda points out, a very different problem point for the Law of the Sea draftsmen than the unclaimed nodules of the seabeds.[15] In principle open to all, they had by the middle of the twentieth century often come to be regarded with a certain feeling of proprietorship by the coastal state, a feeling that unfortunately did not extend to the protection of stocks from overfishing. Multilateral treaties had proved largely ineffectual either in dealing with the rights of the coastal state or in preventing such overfishing. Delegates to the Conference were aware of this history, and also understood very well that most of the commercial fishries of the world are

12. *Id.* art. 218.
13. *See, e.g.*, art. 218(4). *See generally id.* art. 217.
14. *See generally id.* arts. 17-54.
15. Oda, *supra* note 1, at 13.

within 200 miles of the coast.

Against this backdrop, it was easy for the first session of the Law of the Sea Conference in 1974 to find agreement on a 200-mile exclusive economic zone, the major consequence of which was to give exclusive fishing jurisdiction to the coastal state. This was acceptable to the United States, however, only in the context of an overall treaty. Until 1976 the U.S. Delegation firmly opposed any unilateral attempt to claim 200-mile jurisdiction, not, as Judge Oda suggests,[16] because of pressure from the distant-water tuna fisherman, but because the Delegation believed that the prospect of obtaining a 200-mile zone would be the major inducement for many coastal states to sign the treaty and to concede the navigation rights that the United States regarded as its most important feature.

But the floodgates were opened in 1976 when pressure from coastal fisheries interests forced the United States to reverse it position and to adopt 200-mile legislation. This political pressure was not simply the result of avarice on the part of United States fishermen — although it would be naive to think that hope of profit from the elimination of foreign fishing did not play a role — but was largely a manifestation of their anger at the decimation by foreign fleets of coastal stocks that they had traditionally fished. Notable examples of stocks brought close to commercial extinction were the haddock on the Georges Bank off New England, badly damaged by the Soviets; and the halibut fishery of the Pacific Northwest and Alaska, overfished by the Japanese.

With the 200-mile zone no longer an issue, the critical balance at the Conference from 1976 on, was between the navigation and overflight rights sought by the great powers on the one hand, and the interest of the developing states in establishing the status of the resources of the deep seabeds as the common heritage of mankind on the other. Fisheries had been effectively removed as an important element in the negotiations.

C. *Deep Seabed Mineral Resources*

Judge Oda has correctly drawn our attention to the economic implications of the demarcation between the continental shelf, whose resources, largely oil and gas, fall under the jurisdiction of the coastal state; and the deep seabed, whose resources would, under the Draft Convention, fall to the jurisdiction of the International Seabed Authority.[17] In setting this line, coastal states have largely had their way. This is hardly surprising since most states are coastal states, and must have

16. *Id.* at 7.
17. *Id.* at 9.

the hope, if not the fact, of finding oil and gas on their shelves and fish in their economic zones. It is the landlocked developing states, and those developing coastal states with little or no shelf or economic zone, plus the land-based oil producers, who have carried on the losing struggle against extensions of coastal state jurisdiction. Deep seabed mining companies have had little to do with it.

One can in fact easily overestimate the political influence of the mining companies, all members of international consortia, which have carried out a program of research and development in the hope of collecting and processing the manganese nodules found in certain areas of the deep seabeds. Their spokesmen have been vocal in their criticism of the seabed provisions of the Draft Convention. But their opposition to the present text is tempered by the knowledge that a treaty with fairly broad acceptance will be needed to assure them the site exclusivity that they require. This is well known to the United States authorities; their review of the United States position, which stalled the Conference for two sessions, was motivated largely by concern over what they regarded as unfortunate precedents — a new international organization, production controls, mandatory sale of technology — and by limitation of access to strategic resources, rather than exclusively or even primarily by mining company objections.

Conclusion

Judge Oda pointed out in his speech a number of important resource problems which have faced the Third United Nations Conference on the Law of the Sea. Some of them have been dealt with, or partially dealt with, in the Draft Convention on the Law of the Sea, while others have been scarcely touched. The Draft Convention, however, is only — at least with regard to environmental and resource issues — intended to be a far-reaching and comprehensive "umbrella treaty," not a detailed lexicon. After more than a decade of intensive work by more than a hundred and fifty countries, the critical thing at this point is to solidify the progress already made, to complete this stage of the work, so that the international community may get on with the future progressive development of the law.